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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/630,453	07/30/2003	Allan H. Fuhr	43602-0004	7930 ¹
20822	7590	11/17/2004	EXAMINER	
RUDEN, MCCLOSKEY, SMITH, SCHUSTER & RUSSELL, P.A. P.O. BOX 1900 FORT LAUDERDALE, FL 33301			PAK, JOHN D	
			ART UNIT	PAPER NUMBER
			1616	
DATE MAILED: 11/17/2004				

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/630,453

Applicant(s)

FUHR, ALLAN H.

Examiner

JOHN PAK

Art Unit

1616

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on ____.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-20 is/are pending in the application.
- 4a) Of the above claim(s) 1-3 is/are withdrawn from consideration.
- 5) ☐ Claim(s) ____ is/are allowed.
- 6) ☒ Claim(s) 4-20 is/are rejected.
- 7) ☒ Claim(s) 9 and 20 is/are objected to.
- 8) ☐ Claim(s) ____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on ____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. ____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- ☒ Notice of References Cited (PTO-892)
- ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date ____.
- ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date ____.
- ☐ Notice of Informal Patent Application (PTO-152)
- ☐ Other: ____.

Claims 1-20 are pending in this application.

Restriction to one of the following inventions is required under 35 U.S.C. 121:

- I. Claims 1-3, drawn to method of practicing nasal hygiene comprising applying to a person's nostril a non-irritating hygienic composition consisting essentially of chlorine dioxide/source, olfactory stimulant, fixative, inorganic salt, water soluble aluminum compound, classified in class 424, subclasses 661-665, 679-680, 682, 684-686, 690-691, 698, 717, class 514, subclass 849, 888.
- II. Claims 4-20, drawn to a non-irritating hygienic composition consisting essentially of chlorine dioxide/source, olfactory stimulant, fixative, inorganic salt, water soluble aluminum compound, classified in class 424, subclasses class 424, subclasses 661-665, 679-680, 682, 684-686, 690-691, 698, 717.

Inventions of group II and group I are related as product and process of use. The inventions can be shown to be distinct if either or both of the following can be shown: (1) the process for using the product as claimed can be practiced with another materially different product or (2) the product as claimed can be used in a materially different process of using that product (MPEP § 806.05(h)). In the instant case the product (composition) as claimed can be used in a materially different process, such as in the treatment of mastitis.

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The search and examination of more than one invention group would place an undue burden on the Examiner. Even though there is much overlap in the classification of the two inventions, the search for just one of the invention group is already quite extensive and challenging due to the multiple ingredients and specific proportions. Further, a search for the group II invention (composition) would require searching and reviewing documents that are not at all related to application or utility to a person's nostril. The invention of group II is directed to the composition per se, and it must be searched by researching similar compositions regardless of intended use. As such, the review and examination of group II invention would involve a burden that is quite different and distinct from those of group I invention. In view of the already extensive burden that would be placed on the examiner for just one invention group, a search and examination of more than one invention group would rise up to a level that would be undue burden.

Therefore, for reasons of distinctness and undue burden, the restriction requirement as set forth above is deemed to be proper.

During a telephone conversation with Mr. Robert Schwartz on 11/9/2004 a provisional election was made with traverse to prosecute the invention of group II, claims 4-20. Affirmation of this election must be made by applicant in replying to this Office action. Claims 1-3 are withdrawn from further consideration by the examiner, 37 CFR 1.142(b), as being drawn to a non-elected invention.

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It is also noted for the record that during the same telephone conversation with Mr. Schwartz on 11/9/2004, the Examiner was informed that there was no IDS filed in this application.

The examiner has required restriction between product and process claims. Where applicant elects claims directed to the product, and a product claim is subsequently found allowable, withdrawn process claims that depend from or otherwise include all the limitations of the allowable product claim will be rejoined in accordance with the provisions of MPEP § 821.04. **Process claims that depend from or otherwise include all the limitations of the patentable product** will be entered as a matter of right if the amendment is presented prior to final rejection or allowance, whichever is earlier. Amendments submitted after final rejection are governed by 37 CFR 1.116; amendments submitted after allowance are governed by 37 CFR 1.312.

In the event of rejoinder, the requirement for restriction between the product claims and the rejoined process claims will be withdrawn, and the rejoined process claims will be fully examined for patentability in accordance with 37 CFR 1.104. Thus, to be allowable, the rejoined claims must meet all criteria for patentability including the requirements of 35 U.S.C. 101, 102, 103, and 112. Until an elected product claim is found allowable, an otherwise proper restriction requirement between product claims and process claims may be maintained. Withdrawn process claims that are not commensurate in scope with an allowed product claim will not be rejoined. See "Guidance on Treatment of Product and Process Claims in light of *In re Ochiai*, *In re Brouwer* and 35 U.S.C. § 103(b)," 1184 O.G. 86 (March 26, 1996). Additionally, in order to retain the right to rejoinder in accordance with the above policy, Applicant is advised that the process claims should be amended during prosecution either to maintain dependency on the product claims or to otherwise include the limitations of the product claims. **Failure to do so may result in a loss of the right to rejoinder.** Further, note that the prohibition against double patenting rejections of 35 U.S.C. 121 does not apply where the restriction requirement is withdrawn by the examiner before the patent issues. See MPEP § 804.01.

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

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Claims 4-20 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

At lines 3-4 of claim 4, it cannot be understood what is meant by "0.01% to 5% by weight, **as** chlorine dioxide, of a source of chlorine dioxide" (emphasis added). The language is confusing because not all of a chlorine dioxide source will immediately oxidize to chlorine dioxide in the absence of strongly irritating conditions. So the phrase, "as chlorine dioxide" is confusing and indefinite, because the total weight of the chlorine dioxide does not appear to be actually related to a single composition without containing such strong oxidants to be irritating. Analogous problem is noted in claim 6.

At line 7 of claim 4, there should be a comma after "stimulant."

All claims that depend from claim 4 are included in this ground of rejection because said claims do not overcome the deficiency noted for claim 4.

Claims 9 and 20 are objected to under 37 CFR 1.75(c), as being of improper dependent form for failing to further limit the subject matter of a previous claim.

Applicant is required to cancel the claim(s), or amend the claim(s) to place the claim(s) in proper dependent form, or rewrite the claim(s) in independent form.

The limitation of claim 9 is already in the independent claim 4.

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Claim 20 requires that the chlorine dioxide cannot be detected. This would mean that the claim required features of independent claim 1 is not being met, i.e. "0.01% to 5% by weight, as chlorine dioxide, of a source of chlorine dioxide."

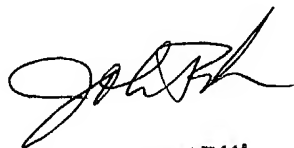
References listed on the attached PTO-892 are cited to show the state of the art. Applicant is advised that this application will be subject to a search update at the time of the next Office action.

Any inquiry concerning this communication or earlier communications from the Examiner should be directed to JOHN PAK whose telephone number is **(571)272-0620**. The Examiner can normally be reached on Monday to Friday from 8 AM to 4:30 PM.

If attempts to reach the Examiner by telephone are unsuccessful, the Examiner's SPE, Gary Kunz, can be reached on **(571)272-0887**.

The fax phone number for the organization where this application or proceeding is assigned is (703)872-9306.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (571)272-1600.



JOHN PAK
PRIMARY EXAMINER
GROUP 1600